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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARCEL ONATE, Defendant and Appellant.	B216402 (Los Angeles County Super. Ct. No. PA056931)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed with modifications.

Sara Zalkin for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Marcel Onate, appeals following his nolo contendere plea, from his conviction for marijuana possession. (Health & Saf. Code, § 11357, subd. (a).) Defendant argues the trial court improperly denied his Penal Code[1] section 1538.5, subdivision (i) evidence suppression motion. We modify the order granting probation in minor respects but otherwise affirm.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Defendant's section 1538.5 suppression motion was heard at the time of his preliminary hearing. The evidence presented revealed that at approximately 9:30 p.m. on December 9, 2007, California Highway Patrol Officer Joseph Joller was at a restaurant. Officer Joller was not on duty nor in uniform. Officer Joller had been at the restaurant since 1:30 or 2 p.m. watching football games. Officer Joller had been drinking white Russians at the rate of one per hour. Officer Joller was seated at a table in the bar.

Defendant approached Officer Joller. Defendant commented on Officer Joller's Humboldt T-shirt. Defendant said he had just come to Los Angeles from Northern California. Defendant said he had harvested 30 pounds of marijuana at his home in Trinity. Defendant said he was going to sell the marijuana through friends at Cal Arts College and to various clubs in Los Angeles. Defendant showed Officer Joller an Oakland Cannabis Cooperative buyer's card. Officer Joller was asked if he knew anyone who wanted to buy a pound. Officer Joller laughed and said, "No, I don't know anybody that wants to buy a pound." Defendant said he was not joking. Defendant pulled out a glass vial filled with marijuana, passed it across the table, and told Officer Joller to smell it.

Officer Joller inquired about how much a pound of marijuana sells for. Defendant responded, "[A]bout $3,000." Defendant then finished drinking his beer and left. The following day, Officer Joller, while off duty, went through the parking lot of the Hyatt

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Hotel across from the restaurant where he had been drinking. Officer Joller looked for cars from Northern California or had an odor of marijuana. Officer Joller also contacted Highway Patrol Officer Richard Cheever to explain what occurred in the restaurant. At approximately 10:50 p.m. on December 11, 2007, a friend called Officer Joller from the restaurant. Officer Joller asked the friend if anyone resembling defendant was present. Officer Joller's friend said that there was. Officer Joller arrived at the restaurant and saw defendant and another man, identified only as Mr. Malisos, arguing with the restaurant manager.

Officer Joller went outside where he called his sergeants. Officer Joller also called Officer Cheever. Officer Joller saw defendant and Mr. Malisos walk out of the restaurant. Officer Cheever followed defendant and the person identified only as Mr. Malisos to the Hyatt Hotel parking structure. Defendant then entered the Hyatt Hotel. Officer Cheever arrived at the hotel at approximately 11:45 p.m. Officers Joller and Cheever waited approximately nine hours outside the hotel. At approximately 9:30 a.m., defendant and Mr. Malisos left the hotel. Defendant was carrying a large, heavy black duffel bag on his shoulder. Defendant placed the duffel bag into a blue car. Mr. Malisos placed another duffel bag into a car with Hawaii license plates. Defendant and Mr. Malisos returned to the hotel. Officer Cheever followed them and stood nearby as they checked out. Officer Cheever could smell marijuana on defendant's person. After they left, Officer Cheever obtained defendant's name from the desk clerk.

Officer Cheever followed defendant and Mr. Malisos back to the parking structure. Defendant got into the blue car and Mr. Malisos into a Chevrolet truck. Officers Cheever and Joller followed them in an unmarked truck as they drove away. After driving through several green lights, defendant drove through a red turn arrow. Mr. Malisos followed defendant through the red turn arrow.

Officer Cheever was in radio contact with Officer Paul Peterson, who had been briefed that a surveillance was in progress. Officer Cheever told Officer Peterson: "'Hey, these guys might be transporting a large amount of marijuana. Be careful. It's an officer-safety issue.'" Officer Cheever also told Officer Peterson defendant had run a stop light

and that was the reason for the stop. Officer Peterson stopped defendant's car for failing to stop at a red light.

Officer Peterson smelled a very strong marijuana odor coming from defendant's car. Defendant was asked if he had any marijuana in the car. Defendant responded that he had about 30 pounds of marijuana in his car. Officer Peterson noticed a large duffel bag on the front seat of the car. After handcuffing defendant, Officer Peterson opened the duffle bag on the seat of the car. Officer Peterson found several clear plastic baggies of marijuana inside the duffle bag. Officer Cheever stopped Mr. Malisos truck for the same infraction. Both cars were towed to the Newhall Highway Patrol office for inventory.

When the car the defendant drove was inventoried, Officer Cheever found: 25 packages of marijuana; a jar containing marijuana; a one-pound package of concentrated cannabis; an electronic scale; a cannabis mulcher; and a box containing $2,000. The parties stipulated for purposes of the preliminary hearing that the total weight of the marijuana seized was approximately 17 pounds. Defendant had over $2,000 in his wallet and a marijuana pipe in his pocket. Officer Cheever believed the marijuana was possessed for purposes of sale based upon: the amount; the cash; the paraphernalia; and defendant's offer to sell marijuana on December 9, 2007.

Defendant testified the conversation with Officer Joller on December 9, 2007 inside the restaurant involved medical marijuana. Defendant denied offering to sell marijuana to Officer Joller. Rather, defendant testified that Officer Joller asked to '"buy a couple of grams"' of marijuana when they were inside the restaurant. Defendant denied stating he wanted to sell the marijuana for $3,000 per pound. Defendant also denied having violated any traffic laws prior to being stopped by Officer Peterson.

In denying the section 1538.5 motion, the magistrate noted that the United States Supreme Court has long recognized an automobile exception to the warrant requirement. The trial court cited to *Carroll v. United States* (1925) 267 U.S. 132, 153 and *People v. Allen* (2000) 78 Cal.App.4th 445, 449, noting, "If a vehicle is presumably mobile and probable cause exists to believe that it contains contraband, the 4th Amendment permits

the search of the vehicle." The magistrate continued: "The reasons for the vehicle exception are twofold. Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less that that relating to one's home or office. [¶] Probable cause to justify a warrantless search of an automobile may be based on objective facts that could justify the issuance of a warrant by a magistrate. . . . [¶] The dispositive inquiry in a motion to suppress evidence found in an automobile search is whether the objective facts demonstrate the officers had probable cause to believe that the vehicle contained contraband. And that is from *People v. Superior Court* [*(Overland)*], that is 203 Cal.App.3d 1114. It's an '88 case. [¶] I believe that, based on the conversations that took place between the defendant and Officer Joller, there was probable cause to believe that the defendant's vehicle would contain the contraband that he had offered was in his vehicle. [¶] And according to the testimony of Officer Joller and Officer Cheever, the first time that the particular vehicle belonging to the defendant was identified was when the defendant walked out of the Hyatt with what was described as a very heavy duffel bag, that he was, somewhat, limping as he walked and he went to a particular vehicle. Until that point, there was no identification of which vehicle belonged to the defendant. I did not find, in my search, any law that required that under those circumstances, the fact that the officers have at that point identified which is his vehicle and that it appears - - and I believe there was probable cause to believe that the vehicle would contain the contraband, that the defendant himself had offered was in his vehicle. [¶] Between that point and the point when the car was stopped, I don't believe that the law required that the officers get on the phone and get a search warrant. I believe the law is clear. And under the automobile exception to the 4th Amendment requirements of a valid search warrant, I believe that the search was appropriate. I believe, also, that there was reasonable suspicion, which warranted detaining the vehicle and searching for contraband. [¶] So based on that reasoning and having fully considered the testimony and fully considered the arguments raised by both sides, as well as the moving papers, the court is going to deny the defendant's 1538.5 motion."

First, defendant argues the magistrate improperly believed Officer Joller. Defendant argues, "Notwithstanding the officer's admitted consumption of at least nine vodka cocktails ('White Russians'), along with his denial under oath, that he was intoxicated; inebriated; or even 'under the influence,' the Magistrate determined his claim that [defendant] offered to sell him marijuana was credible and [defendant's] denial was not." The present issue comes to us as a result of the denial of the renewed suppression of evidence motion made after defendant was held to answer pursuant to Penal Code section 1538.5, subdivision (i) which states in part: "If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing . . ., the defendant shall have the right to renew or make the motion at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time. . . . If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing."

The trial court sits as a reviewing court in ruling on a suppression of evidence motion. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718; *People v. Bishop* (1993) 14 Cal.App.4th 203, 214.) We then apply the following standard of review: "[W]e review the magistrate's explicit or implicit factual findings directly, to determine whether the findings were supported by substantial evidence (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 679; cf. *People v. Bishop*[, *supra,*] 14 Cal.App.4th [at p.] 214); we then exercise our independent judgment to determine whether, on the facts found, the seizure . . . was unreasonable within the meaning of the Constitution. (*People v. Leyba* (1981) 29 Cal.3d 591, 597; cf. *People v. Ramsey*, *supra,* 203 Cal.App.3d at p. 679.)" (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.)

Consistent with the Fourth Amendment to the United States Constitution, the police may stop and detain a motorist on reasonable suspicion the driver has violated the

law. (*Ornelas v. United States* (1996) 517 U.S. 690, 693; *People v. Wells* (2006) 38 Cal.4th 1078, 1082; *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 200.) Reasonable suspicion is a lesser standard than probable cause. (*Alabama v. White* (1990) 496 U.S. 325, 330; *People v. Wells, supra,* 38 Cal.4th at p. 1083.) As our Supreme Court has explained: "The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' (*Terry v. Ohio* [(1968)] 392 U.S. [1,] 19; see *In re Tony C.* [(1978)] 21 Cal.3d [888,] 892.) In making our determination, we examine 'the totality of the circumstances' in each case. (E.g., *Alabama v. White*[, *supra,*] 496 U.S. [at p.] 330; *United States v. Wheat* (8th Cir. 2001) 278 F.3d 722, 726 . . . .) [¶] Reasonable suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause, including an anonymous tip. (E.g., *Alabama v. White, supra,* 496 U.S. at p. 300.) But to be reasonable, the officer's suspicion must be supported by some specific, articulable facts that are 'reasonably "consistent with criminal activity"' (*In re Tony C., supra,* 21 Cal.3d at p. 894.) The officer's subjective suspicion must be objectively reasonable, and 'an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]' (*Id.* at p. 893.) But where a reasonable suspicion of criminal activity exists, 'the public rightfully expects a police officer to inquire into such circumstances "in the proper exercise of the officer's duties." [Citation.]' (*Id.* at p. 894.)" (*People v. Wells, supra,* 38 Cal.4th at p. 1083; accord, e.g., *People v. Hernandez* (2008) 45 Cal.4th 295, 299; *In re Raymond C.* (2008) 45 Cal.4th 303, 307.)

Moreover, the United States Supreme Court has held: " [Law enforcement officers can] draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273; accord, *People v. Hernandez, supra,* 45 Cal.4th at p. 299; *People v. Williams* (2007) 156 Cal.App.4th 949, 959; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 863.) And

police officers can rely on facts that are as consistent with innocence as they are with guilt. (*United States v. Arvizu, supra,* 534 U.S. at p. 274; *People v. Ledesma, supra,* 106 Cal.App.4th at p. 863.)

Here, the magistrate could reasonably believe Officer Joller's testimony regarding the encounter. Officer Joller testified that despite the fact that he had approximately nine drinks over nine hours, he was not intoxicated, inebriated, or under the influence at the time he spoke with defendant about the marijuana. Office Joller further testified defendant offered to sell the marijuana. There was substantial evidence to support the magistrate's express finding.

Second, defendant argues the magistrate improperly excluded the testimony of two witnesses who would verify his membership in two cannabis clubs and his legal status as a caregiver. The club owner was identified as William H. Dailey. Another witness, Tamer El-Shakhs, was a lawyer for the club. Mr. El-Shakhs issued a letter to defendant. The letter verified his status as a caregiver for the club. The trial court refused to allow their testimony under Evidence Code section 352: "Based on the testimony that was provided by Officer Joller regarding the conversation that purportedly occurred between the defendant and him at B.J.'s, I don't believe that the issue to be decided by the court, at this level, requires the testimony of the second and third witness. But, certainly, if [defendant] wants to take the stand, I'll hear what he has to say with regards to what occurred at B.J.'s." The magistrate further explained that even if he has a defense: "[Defendant's] testimony raises an issue as to whether he was acting outside the bounds of what is permissible for him as a cannabis provider or caretaker. So I believe it would be relevant to the inquiry before the court at this time. [¶] You may wish to present those other two witnesses at another time. But for purposes of the decision to be made today, that is what I need to hear."

Section 866 sets the parameters for the preliminary hearing defense witnesses: "The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an

affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." We apply a deferential abuse of discretion standard of review to this contention. (*People v. Daily* (1996) 49 Cal.App.4th 543, 551; *People v. Eid* (1994) 31 Cal.App.4th 114, 126.)

Here, the magistrate requested an offer of proof from defense counsel with regard to the testimony of Mr. Daily or Mr. El-Shakhs. Defense counsel indicated that they would establish defendant was a member of two cannabis clubs. Further, defense counsel alleged defendant was also authorized as a caregiver who was to deliver marijuana to the club. The magistrate could properly determine that this evidence would not serve to impeach Officer Joller's testimony regarding defendant's offer to sell a pound of marijuana. Neither individual was a witness to the conversation between defendant and Officer Joller. Moreover, the witnesses would not be in a position to comment on whether defendant had exceeded his authorized role in the transportation of marijuana for legal medical purposes. No abuse of discretion occurred. Further, there is no merit to the argument defendant could act as a caregiver in offering to sell marijuana to Officer Joller. (*People v. Mentch* (2008) 45 Cal.4th 274, 290-292; Health & Saf. Code, § 11362.765.) **Although *Mentch* was decided after the hearing in this matter, judicial decisions are generally given retroactive effect. (See *Newman v. Emerson Radio* (1989) 49 Cal.3d 973, 978; *People v. Guerra* (1984) 37 Cal.3d 385, 400.)**

Third, defendant further argues that the magistrate improperly denied the suppression motion based upon the "automobile exception." Defendant argues that theory had not been raised by the prosecution in its written papers and he was not allowed to do further briefing on that issue. However, the prosecutor did include both grounds in his argument that probable cause existed to perform an investigative stop based upon suspected marijuana possession. Moreover, defendant did have the opportunity to address that theory when he renewed his suppression of evidence motion in superior court.

Fourth, defendant argues the trial court improperly denied his renewed suppression motion pursuant to section 1538.5, subdivision (i) filed after he was held to

answer. At the time of the renewed motion, defendant again sought a special hearing to allow Mr. Dailey and Mr. El-Shakhs to testify. The trial court reviewed the preliminary hearing transcript. In denying the renewed motion, the trial court held: "[W]ith respect to search and seizure only . . . the [magistrate] . . . made its decision based on the testimony at the hearing. The fact that the defendant had medical marijuana, the fact that he had a lawyer saying he had medical marijuana, the fact that he was . . . a provider of medical marijuana does not mean he can't offer to sell marijuana." As noted previously, the witnesses' testimony was irrelevant to defendant's offer to sell the marijuana for illegal purposes. The trial court could reasonably rule that the magistrate properly could exclude the witnesses' testimony and find their testimony was not relevant at the time of the renewed motion.

Fifth, defendant argues that the trial court's comment, "[T]he reasons for the stop were articulated clearly" was troubling in light of the magistrate's initial concern regarding a pretextual stop and subsequent "sua sponte advancement of the automobile exception to justify" the stop and ensuing seizure. Again, as set forth previously herein, there was testimony that there was probable cause to detain and search defendant for suspicion of illegal marijuana possession. As a result, the trial court's comment was justified. As we noted earlier, an officer may stop and detain a motorist on a reasonable suspicion that the driver violated the law. (*Ornelas v. United States, supra*, 517 U.S. at p. 693; *People v. Wells, supra,* 38 Cal.4th at p. 1082.) The United States Supreme Court has further held that officers may draw on their own experience and the information available to them to make inferences from and deductions about an individual's suspicious activities. (*United States v. Arvizu, supra*, 534 U.S. at p. 273; see *also People v. Hernandez, supra*, 45 Cal.4th at p. 299.) In this case, defendant offered to sell a pound of marijuana to Officer Joller. Moreover, defendant said he had 30 pounds of marijuana that he intended to sell. Defendant was observed carrying a heavy duffle bag to his car. These facts served as probable cause to detain and search defendant's automobile. Further, defendant was seen making an illegal left turn and his car smelled of marijuana when it was stopped. Defendant further admitted he was in possession of marijuana.

Thus, all of the events from the moment of the stop until the seizure of the contraband complied with the Constitution. (*Arkansas v. Sullivan* (2001) 532 U.S. 769, 771; *People v. Collier* (2008) 166 Cal.App.4th 1374, 1377.) As a result, the trial court could properly deny defendant's renewed suppression motion.

Sixth, following our request for further briefing, the Attorney General argues that the trial court should have imposed additional fees and penalties as to the $50 Health and Safety Code section 11372.5, subdivision (a). We agree. The trial court orally imposed the $50 laboratory fee plus penalty assessments. The clerk's minutes state penalty assessments in the sum of $120 were imposed pursuant to section 1464 and Government Code section 76000. However, the following assessments, penalties and surcharge on the Health and Safety Code section 11372.5, subdivision (a) fine should have been imposed as follows: a $50 section 1464, subdivision (a)(1) state penalty assessment; a $35 Government Code section 76000, subdivision (a)(1) penalty assessment; a $10 section 1465.7, subdivision (a) state surcharge; a $15 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $10 Government Code section 76000.5, subdivision (a)(1) penalty assessment; a $5 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty assessment; and a $5 Government code section 76104.7, subdivision (a) deoxyribonucleic acid penalty identification fund penalty assessment. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254.) The trial court is to actively and personally insure the clerk accurately prepares a correct amended minute order which reflects the foregoing modifications to the order granting probation. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

The judgment is modified to include the additional fees and penalties set forth herein. The judgment is affirmed in all other respects. Upon remittitur issuance, the superior court clerk shall prepare an amended minute order expressly specifying the sums due.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.